



**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

UNITED STATES OF AMERICA
v.
ANDRE C. CARTER,
Petitioner.

Criminal No. 3:07cr403-HEH

MEMORANDUM OPINION
**(Accepting Report and Recommendation
and Denying 28 U.S.C. § 2255 Motion)**

Andre C. Carter (“Petitioner”) has filed this motion pursuant to 28 U.S.C. § 2255

wherein he claims he was entitled to relief upon the following grounds:

Claim One Counsel failed to file an appeal.

Claim Two Counsel failed to object to and challenge Petitioner's conviction for simple possession of crack on the grounds that this offense was not a lesser included offense of possession with the intent to distribute five grams or more of crack (Count One).

Claim Three Counsel failed to challenge the Petitioner's guideline sentence on the grounds that it was not presumptively reasonable.

By Memorandum Opinion and Order entered on August 30, 2010, the Court dismissed Claims Two and Three and referred Claim One to the Magistrate Judge to conduct an evidentiary hearing.

After the conclusion of the evidentiary hearing, the Magistrate Judge issued a Report and Recommendation on July 12, 2011, wherein she recommended that the Court dismiss Claim One. Petitioner moved for an extension of time to ascertain whether he intended to file objections to the Report and Recommendation. By Order entered on

August 2, 2011, the Court granted Petitioner eleven (11) days from the date of entry thereof to file objections. More than eleven (11) days have elapsed since the entry of the August 2, 2011 Order and Petitioner has not filed objections to the Report and Recommendation. Accordingly, the Report and Recommendation will be accepted and adopted. Claim One will be dismissed. The 28 U.S.C. § 2255 Motion will be denied. The action will be dismissed.

An appeal may not be taken from the final order in a § 2255 proceeding unless a judge issues a certificate of appealability (“COA”). 28 U.S.C. § 2253(c)(1)(B). A COA will not issue unless a prisoner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requirement is satisfied only when “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). For the reasons stated more fully in the Memorandum Opinion entered on August 30, 2011, no law or evidence suggests that Carter is entitled to further consideration in this matter. A certificate of appealability is therefore denied.

An appropriate Order shall accompany this Memorandum Opinion.



/s/
HENRY E. HUDSON
UNITED STATES DISTRICT JUDGE

Date: Dec 12, 2011
Richmond, Virginia